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Chapter 6

CAMERA SURVEILLANCE IN THE NETHERLANDS

Sjaak Nouwt, Berend R. de Vries, Dorus van der Burgt¹

6.1 INTRODUCTION²

Although camera surveillance, especially in public places, has been an important focal point in the public debate on privacy in the Netherlands, the Dutch have more or less accepted the phenomenon³ and nowadays almost every self-respecting town has at least one camera watching over its citizens.⁴ In the Netherlands, camera surveillance is not as common as, for instance, in the United Kingdom, where an estimated one and a half million cameras have been installed but, especially in city centres, the camera density is quite significant.⁵ In this chapter, we will discuss the current state of privacy and camera surveillance in the Netherlands. The terms ‘camera’ or ‘video surveillance’ refer to all semi-permanently installed video equipment. Although a clear distinction is difficult, our definition does not include video cameras in mobile phones and most cameras attached to PCs (webcams). As a consequence we rule out cameras that are not primarily used to monitor places or behaviour.

As the rules governing video surveillance in public and private places differ, we will discuss both forms separately. In section 6.3 we will discuss the rules governing camera surveillance in public places and especially the relevant case law. Section 6.4 follows with a discussion of the situation in private places and section 6.5 concludes. Before that we will discuss the relevant legal framework.

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² We thank Eric Schreuders for his preliminary work on this research project. Some of the ideas put forward in this chapter originate from early remarks and notes made by Eric.

³ In their empirical study, Koops & Vedder found that camera surveillance as a method for surveillance and law enforcement was found to be acceptable by 65 per cent of Dutch citizens, see: B.J. Koops & A. Vedder, *Opsporing versus privacy: de beleving van burgers*, ITeR 45, (Den Haag, SDU 2001), p. 47.

⁴ A 2003 survey shows that 77% of cities with over 100,000 inhabitants have installed cameras in public places, see G.H.J. Homburg & S. Dekkers, *Cameratoezicht in de openbare ruimte, rapport I*; College Bescherming Persoonsgegevens, Den Haag, November 2003, p. 5.

⁵ S. Flight, ‘Cameratoezicht en verplaatsing van criminaliteit en overlast’, in O. Klumper & J. de Haan (eds.), *Jaarboek ICT en Samenleving 2004* (Amsterdam, Boom); with reference to: C. Norris, & G. Armstrong, *The Maximum Surveillance Society: The Rise of CCTV* (Oxford, Berg 1999).

6.2 GENERAL LEGAL FRAMEWORK

6.2.1 Historical perspective

Before we discuss the current framework, we will briefly discuss the situation before the Personal Data Protection Act 2000 [*Wet Bescherming Persoonsgegevens*; WBP] implemented the EU Data Protection Directive of 1995. The Personal Data Protection Act came into force in September 2001, replacing the Registration of Personal Data Act [*Wet persoonsregistraties*; WPR] of 1988. The WPR focused on the protection of personal data in data collections and did not specifically regulate the distribution of and the way in which data was obtained.⁶ It seems that the purpose of this Act was to diminish the hazards that easily accessible data collections would impose on individual members of society. The WPR did not specifically cover other technologies, such as video surveillance, where the privacy concerns are broader than automated data collection and retention, and where the monitoring itself created a dilemma.

In 1997, the Dutch Data Protection Authority⁷ discussed the applicability of the WPR to the use of video cameras for surveillance and security purposes (in a report called ‘In beeld gebracht’).⁸ The DPA argued that the WPR was not applicable to analogous recordings, e.g., videotapes, unless special conditions applied. The WPR was only applicable to video surveillance if personal data was collected and stored in a digital form, or if analogous recordings were further processed in a digital way. This was the case when a certain structure was used to facilitate consultation of the data. The WPR was not applicable to cameras that were solely used to monitor and did not record anything.

The legal framework for video surveillance did not only consist of the WPR. As from the modification of the Dutch Constitution in 1983, a constitutional right, laid down in Article 10 of the Constitution, protects private life. This constitutional right may only be limited by legislation. However, constitutional rights like this one are in general only applicable to the vertical relationship between government and citizens and, according to Article 120 of the Constitution, the courts are not allowed to test whether a law or a treaty is in accordance with the Constitution. Therefore, this constitutional right is not much debated in Dutch case law.

Apart from the Dutch Constitution, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is also applicable.⁹ In the case law on privacy, this Article is of greater importance than the above-

⁶ F. Kuitenbrouwer, ‘Privacy: een historisch-vergelijkend overzicht’, in J.E.J. Prins & J.M.A. Berkvens (eds.), *Privacyregulering in theorie en praktijk* (Deventer, Kluwer 2002).

⁷ College Bescherming Persoonsgegevens, formerly known as the Registratiekamer.

⁸ Dutch Data Protection Authority, research report ‘In beeld gebracht’, The Hague, 27 January 1997. On the Internet: <http://www.cbpweb.nl/documenten/rap_1997_In_Beeld_Gebraucht.htm>, last visited June 2004. An updated version of this report is expected in December 2004.

⁹ This treaty was ratified on 31 August 1954.

mentioned Article 10 of the Constitution. According to the second paragraph of Article 8, interfering with this right is only allowed by a public authority, in accordance with the law, and when necessary for specific purposes in a democratic society.

Finally, also Article 17 of the International Covenant on Civil and Political Rights (1966) protects the citizen against arbitrary or unlawful interference with his privacy. According to paragraph 2 of Article 17, everyone has the right to be protected by the law against such interference or attacks.

In a policy document about video surveillance,¹⁰ the Dutch government concluded that the right to privacy, guaranteed in the above-mentioned treaties and the Dutch Constitution, is not a well-defined concept, especially with regard to video surveillance. Nevertheless, several general criteria were derived from the legal history, case law, and literature to answer the question of whether video surveillance violates the right to privacy. These criteria are:

- the extent of transparency. In 1991 the Dutch Supreme Court, in deciding on a case regarding the seizure of videotapes that had recorded images of a demonstration, stated that the mere fact that the behaviour recorded on these video tapes took place in a public place was insufficient to reject an appeal to the right to privacy.¹¹
- the kind and extent of intimacy. The Dutch Supreme Court concluded in 1987 that the mere recording of a telephone conversation on a tape, without the consent of the interlocutors, does not necessarily interfere with the right to privacy, but that other circumstances are also of influence.¹²
- the freedom to be oneself. In 1994, the Court of Appeal of Amsterdam concluded that employees of a warehouse who were monitored by video cameras must have the freedom to be themselves in a place where they could change their clothes.¹³ According to the government, this criterion was made objective just like the concept of ‘reasonable expectation of privacy’ was made objective in the *Lüdi* case¹⁴ and also in an earlier case by the Dutch Supreme Court in 1995.¹⁵
- the use of the images. The mere monitoring of persons by CCTV is less invasive for the privacy of these individuals than the recording of these images. A more obvious invasion of privacy is the distribution of these images to others. However, according to the Dutch Supreme Court, the disclosure of videotapes

¹⁰ Notitie Cameratoezicht [*Policy Memorandum on Camera Surveillance*], Kamerstukken II, 1997/98, 25 760, No. 1, p. 5.

¹¹ HR 19 February 1991, *NJ* 1992, No. 50, PN 2004-132.

¹² HR 16 October 1987, *NJ* 1988, No. 850, PN 2004-133.

¹³ Hof Amsterdam 24 March 1994, *NJ* 1994, No. 478, PN 2004-134.

¹⁴ ECHR 15 June 1992, *NJ* 1993, No. 711 (*Lüdi*), PN 2004-135.

¹⁵ HR 19 December 1995, *NJ* 1996, No. 249 (*Zwolsman*), PN 2004-136.

- without the consent or knowledge of the data subject is not always an invasion of privacy.¹⁶
- the openness of video surveillance. From a judgment by the Dutch Supreme Court in 1987,¹⁷ we can conclude that, if (video) images are recorded without the consent or knowledge of the persons involved, an invasion of privacy will be more readily accepted than in cases where consent was given or where there was knowledge of the camera surveillance. This is especially the case if the cameras are hidden.
 - the systematic use of video cameras. Finally, the criterion of whether or not video cameras are used in a systematic way is an important factor. The systematic character of the use is determined by the duration and intensity of camera use, the static or dynamic character of camera use, and the use of possibilities to turn and zoom. From the case law, it can be concluded that the courts focus especially on the duration of camera use.¹⁸

The Dutch Data Protection Authority formulated similar criteria relating to video surveillance in the workplace.¹⁹

6.2.2 The Personal Data Protection Act 2000

On 1 September 2001, the Personal Data Protection Act (WBP) came into force.²⁰ The WBP replaced the WPR (1988) and implemented the 1995 EU Data Protection Directive. While the WPR only protected personal data that was stored in a register, the WBP protects personal data from the moment of collection until the deletion of the data. The WBP is applicable to the automated processing of personal data. The WBP is also applicable to the processing of personal data by non-automated means. It applies if the data are stored in a data filing system which, according to Article 2 WBP, means: ‘any structured set of personal data, regardless of whether or not this data set is centralised or dispersed along functional or geographical lines, that is accessible according to specific criteria and relates to different persons’.

With reference to video surveillance, this means that the WBP is applicable to videotapes if the pictures are structured in such a way that they are accessible according to specific criteria and if the persons can easily be found when consulting the videotapes. For the applicability of the WBP, it is not of importance whether

¹⁶ HR 16 October 1987, *NJ* 1988, No. 850, PN 2004-137.

¹⁷ HR 16 October 1987, *NJ* 1988, No. 850, PN 2004-137.

¹⁸ HR 9 January 1987, *NR* 1987, No. 928 [*Edamse bijstandsmoeder*], PN 2004-138; Pres. Rb Amsterdam 30 September 1991, *KG* 1991, No. 364, PN 2004-139; HR 11 November 1994, *NR* 1995, No. 400, PN 2004-140; CRvB 20 February 1996, *RSV* 1996, No. 12, PN 2004-141.

¹⁹ Letter by the Dutch Data Protection Authority on camera surveillance in the workplace [*Camerabewaking op de werkplek*], 23 July 1998. On the Internet: <<http://home.planet.nl/~privacy1/camera.htm>>, last visited October 2004.

²⁰ Personal Data Protection Act (Unofficial translation): <http://www.cbweb.nl/en/document/en_pdpa.htm>, last visited June 2004.

these pictures are moving or not. It is of importance whether information from persons can be derived from them. The WBP is applicable as soon as the pictures can be considered as ‘any structured set of personal data’.

In general, the WBP is not applicable to analogous video techniques, such as the capture of images and sound on a videotape. On videotapes, pictures are stored sequentially and chronologically. Personal data can only be structured within these limitations of storage. If no additional measures are taken, the pictures can only be retrieved by playing, fast forwarding, or rewinding the tape. This is only different when video recordings are made by a certain selection, or when also other information is stored for retrieving purposes. In these cases, the WBP is applicable.

The WBP is also applicable to digital video techniques. By using digital video techniques, pictures are stored on a digital medium, like a computer’s hard disk. By using different search options, the pictures can easily be retrieved and shown. The pictures can also be very easily manipulated. With digital video techniques, it is often very easy to compare digitally stored information, like pictures and sound, with anonymous people, and thus to identify these people. The processing of personal data by digital video techniques has to be notified to the Dutch Data Protection Authority, unless such notification is exempted by Article 38 of the Exemption Decree.²¹ Only a limited number of situations are exempted from the obligation to notify. This exception only exists if, for example, cameras are clearly visible to the data subjects, and if the pictures are deleted within 24 hours.

Based on the WBP, the Dutch Data Protection Authority drafted some rules of thumb for the legitimate application of camera surveillance:²²

- Define a solid (written) ground for camera surveillance.
- Formulate arguments as to why the legitimate interest of the company or the public interest for camera surveillance outweighs the interest of the data subject’s privacy.
- Explain why the purpose, like the surveillance of property, cannot be realised in a different way, which is less invasive for the data subjects.
- Camera surveillance should be an element of a set of measures, for example, to maintain public order.
- Camera surveillance should be used selectively. No more data should be stored than is strictly necessary.
- The fact that camera surveillance is used in a specific area or location should be clearly notified. Otherwise, camera surveillance is, in most cases, punishable.

²¹ Some data processing activities are exempted from the general notification obligation. These activities are listed in the Exemption Decree [*Vrijstellingsbesluit Wbp*], On the Internet: <http://www.justitie.nl/Images/11_5237.pdf>, last visited October 2004.

²² Dutch Data Protection Authority, *Cameratoezicht in de praktijk* [*Camera surveillance in practice*]. On the Internet: <http://www.cbpreweb.nl/themadossiers/th_cam_praktijk.stm>, last visited October 2004.

- Secret camera surveillance (e.g., without informing the public) in public places is punishable.
- Explain in a procedure or protocol how a data subject can have access to his personal data and how his other data subject rights are dealt with.
- Pictures may not be kept longer than is necessary. A guideline for the retention period is 24 hours or a maximum of 7 days, except for pictures that provide evidence of unlawful activity.
- In general, camera surveillance should be notified to the Data Protection Authority. Camera surveillance for the protection of people, buildings, territories, goods, or production processes is in general exempted from the notification duty if it complies with the conditions of Article 38 of the Exemption Decree. The exemption exists only when no other personal data are being processed than video recordings of the buildings and the territories and the persons or goods concerned, under the care of the controller, and no other personal data are being processed than those related to the time, date, and place of the video recordings.
- No exemption of notification exists when camera surveillance is applied to maintain public order.
- The Data Protection Authority can impose a fine when there has been a failure to notify camera surveillance, when notification is inaccurate or incomplete, or when changes in the policy of camera surveillance are not notified (on time). The Data Protection Authority can also enforce an administrative order or impose a penalty when other provisions of the WBP are violated.

6.2.3 Other applicable legislation

Other legislation is applicable to camera surveillance depending on the context in which camera surveillance is applied.

After the modification, of Article 441b of the Dutch Penal Code [*Wetboek van Strafrecht*] on 1 January 2004, the secret use of technical equipment to take pictures in a public place has become punishable. A similar rule exists for the secret use of cameras in private places. According to Article 139f of the Penal Code, it is also prohibited to record pictures covertly by means of surveillance in a house or a similar private place, while making use of deceptive means. The pictures must have been taken secretly for the act to be punishable. The Dutch Supreme Court has upheld a decision in which a photographer was punished for taking pictures at a party, which was held in a private house, by hiding his camera under his jacket.²³ He only used his camera visibly when taking his pictures. The Supreme Court concluded that he did not take his pictures secretly, but he did use deceptive means. Furthermore, the data subjects did not expect that photographs would be taken. However, employers are still allowed to use secret cameras in the workplace when

²³ HR 25 June 1974, *NJ* 1974, No. 455, PN 2004-142.

they suspect illegal behaviour on the part of their employees, subject to the condition that the employer informs his employees that he may use hidden cameras in the workplace in such a case.

The police are also allowed to operate cameras secretly (see section 6.3.2). When the pictures are primarily collected for the investigation and detection of criminal offences, the collection of pictures will be considered to form part of a police register and the Police Files Act [*Wet politieregisters*] will be applicable. In other cases, when pictures are primarily collected for observation purposes, the general Personal Data Protection Act is applicable. There may be several good reasons to opt for the applicability of the Police Files Act.²⁴ First, since the mayor is responsible for the protection of public order, he may use the police to maintain public order. According to Article 2 Police Act 1993, the police are in charge of maintaining legal order. Second, because the police are in charge of the investigation and detection of crime, and pictures are collected for these purposes, only the police should have access to these pictures, while at the same time protecting these pictures against access by others. Third, the Police Files Act provides for a better protection of these pictures, because of the closed group of receivers of the data. Fourth, from a practical point of view, it would be less easy if the police had to ask formally and in writing within 24 hours for the transfer of the pictures by the municipality (the mayor) who would be the controller of these pictures. When necessary, the police might seize the pictures, based on their competence according to the Code of Criminal Procedure [*Wetboek van Strafvordering*]. Finally, the police can develop a database with pictures of perpetrators and suspects for analysis or for purposes of investigation or detection of criminal offences. Within the Personal Data Protection Act, more stringent conditions seem to be applicable to such a database.

However, focusing on the investigation and detection of criminal offences and the applicability of the Police Files Act also has disadvantages. The municipal council would have less influence on the collection and use of the pictures. For instance, the chief of police could ignore the municipal council's wish to shorten the retention period. We did not find any important case law on the applicability of the Police Files Act to pictures that had been collected by the use of cameras.

According to the Private Security Organisations and Detective Agencies Act [*Wet particuliere beveiligingsorganisaties en recherchebureaus*], it is forbidden to carry out security activities without a permit. Security activities conducted by a commercial organisation may include services (such as providing video surveillance equipment) to protect people or goods or to prevent disorder in specific areas or buildings. We did not find any important case law on the applicability of the Private Security Organisations and Detective Agencies Acts to the use of video cameras.

²⁴ Research report entitled 'Focus op veiligheid van DSP/ES&E: Lessen en ervaringen van negen Nederlandse gemeenten', August 2000. On the Internet: <http://www.kcgs.nl/kcgs/servlet/nl.gx.siteworks.client.http.GetFile?id=100700/file=focus_op_veiligheid.pdf>, last visited October 2004.

According to the Works Councils Act [*Wet op de ondernemingsraden*], a works council has the right to approve of an employer's decision to use an employee monitoring system [*personeelsvolgsysteem*]. If no works council is available, every employee must be informed about the use of such a monitoring system. All camera surveillance systems must be considered to be employee-monitoring systems as meant in the Works Councils Act. Therefore, the works council must approve of the decision of the employer before the cameras are installed. However, the employer is allowed to use cameras without the approval of the works council if the cameras will only be used occasionally, for example to combat theft or fraud. Approval is also not needed when the cameras are not used to monitor a group of employees.²⁵

According to Article 21 of the Dutch Copyright Act [*Auteurswet*], it is not allowed to publish a portrait of someone, if the person portrayed or, after his death, his relatives have a reasonable interest in opposing its communication to the public. A portrait may be a photograph, painting, sculpture, film, or TV programme. In a recent case, a retailer in Amsterdam was not allowed to place a photograph of a suspected thief (who appeared to be a lady suffering from Alzheimer's disease) in his shop window because it infringed the woman's portrait rights (see also section 6.4.3).

6.3 CAMERA SURVEILLANCE IN PUBLIC PLACES

6.3.1 Introduction

As we mentioned in the introduction to this chapter, video surveillance in public places is accepted by the larger part of the population.²⁶ Based on an inventory study carried out in 2000 among nine Dutch municipalities, only a small minority of citizens have serious objections for reasons of principle against camera surveillance in public places. According to the researchers, the reason why people seemed to accept the use of camera surveillance in public places was twofold. In general, there already seemed to be some support for taking such measures. The acceptance of camera surveillance was also considered to be a 'reward' for careful policymaking. The nine municipalities investigated spent a great deal of time and attention on social and political debates and involved inhabitants, café proprietors, and other stakeholders in communication and information. After the installation of the cameras, it seemed important, in order for support to be given to the measures, to in-

²⁵ Dutch Data Protection Authority, Camera's op de werkplek. *Informatieblad* No. 3, June 2004, [*Cameras in the workplace*]. On the Internet: <http://www.cbpweb.nl/downloads_inf/inf_va_camera_werkplek.pdf>, last visited October 2004.

²⁶ Research report entitled 'Focus op veiligheid van DSP/ES&E: Lessen en ervaringen van negen Nederlandse gemeenten', August 2000. On the Internet: <http://www.kcgs.nl/kcgs/servlet/nl.gx.siteworks.client.http.GetFile/id=100700/file=focus_op_veiligheid.pdf>, last visited October 2004.

form the stakeholders regularly about any major and minor successful results.

An important factor contributing to the social and political acceptance of video surveillance is that, in general, it seems to have a positive effect on crime rates and it seems to boost people's sense of security. In several cities, the use of cameras has been evaluated. The researchers could not draw any evident conclusions on the effects of camera surveillance, because of the small number of municipalities investigated. However, the following impressions did arise from their study:

- Violence in late-night outlets remained stable or decreased; problems seemed to shift indoors to cafés and bars.
- Destruction and vandalism seemed to decrease.
- Trouble caused by youths seemed hardly to decrease or not at all.
- Bicycle thefts and house burglaries seemed hardly to decrease or not at all.
- Car theft seemed to decrease, but it also shifted.
- Drug nuisance seemed to shift as a whole.
- Pick-pocketing seemed to shift.

Even if the camera surveillance did not lower crime rates, the sense of security seemed to increase. Citizens, as well as police officers, indicated that they felt safer in the camera surveillance zones.

Another study undertaken by the Data Protection Authority provided an insight into how camera surveillance in public places functioned in practice and how municipalities dealt with related privacy issues.²⁷ The study, which was carried out in every Dutch municipality, showed that one in five municipalities use camera surveillance to protect public order, to control, and for security purposes. As for municipalities, 6 per cent were considering whether to use camera surveillance in the future. More than 50 per cent of the municipalities which used camera surveillance had not evaluated its effectiveness. This contrasted with the (future) obligation of the Municipalities Act [*Gemeentewet*, see also section 6.3.3) under which the mayor is obliged to send a report on the effectiveness of the camera surveillance to the city council within one month.

Citizens expect that the presence of cameras means that the pictures are being watched 'live', and that action will be taken when an incident occurs. The results of the study showed, however, that most municipalities only use their camera surveillance systems at certain fixed times during the week. In only one out of five municipalities were pictures viewed directly.

More than 50 per cent of the municipalities used camera surveillance in co-operation with other organisations. In most cases, co-operation took place with the police to look for suspects, but there is also co-operation with companies and other

²⁷ Dutch Data Protection Authority, Report on Camera Surveillance in Public Places [*Cameratoezicht in de openbare ruimte*], November 2003. On the Internet: <http://www.cbpweb.nl/downloads_rapporten/rap_2003_cameratoezicht.pdf>, last visited October 2004.

organisations. The framework within which this co-operation took place was often not clear. However, clarity is important because of the responsibility for supervision in public places. Furthermore, the study showed that, in most cases, the necessary facilities for the data subjects to access the pictures in question were lacking.

Another problem was that a number of municipalities did not notify the Data Protection Authority of the processing of personal data related to camera surveillance. The Data Protection Authority announced that it would take action concerning compliance with this legal obligation.

Finally, the Data Protection Authority announced that it would contact a limited number of municipalities about the use of camera surveillance in practice. The Data Protection Authority used the results of this study to update the 1997 report on camera surveillance entitled 'In beeld gebracht'.²⁸ The Data Protection Authority considered the targeted and selective use of camera surveillance as an acceptable addition to a broader set of measures and added that it is necessary to evaluate regularly the effectiveness of camera surveillance. The legal framework for camera surveillance in public places will be updated and tightened where necessary, within the context of the Municipalities Act. We will discuss these additions in section 6.3.3.

Most of the case law on whether camera surveillance in public places unlawfully invades the privacy of individuals concerns cases in the field of criminal law. This is not surprising, as an invasion of privacy will only be debated if someone has a profound interest in questioning the invasion of privacy. In criminal procedures, the objective of questioning the lawfulness of privacy-invading measures is, in general, to have the video material excluded as evidence. If camera surveillance by the government results in such an invasion, it should, on the basis of Article 8 ECHR, be in accordance with the law. One of the problems in this respect is, as we saw above, that camera surveillance in public places is used for several purposes. Cameras can be used specifically to investigate presumed criminal behaviour, but they can also be used for the prevention of public disorder. However, by using camera surveillance for the latter purpose, it is also possible to observe and record criminal offences. The next sections will deal with video surveillance in public places and whether the materials obtained may be used as evidence in criminal procedures.

6.3.2 Observation by the police

The use of cameras by the police for the purpose of investigating presumed criminal activity creates a dilemma between the fundamental rights of a (possibly innocent) suspect and the public interest of investigating and prosecuting criminal activities. We will discuss the questions to what extent and under what circum-

²⁸ Dutch Data Protection Authority, Report on Cameras in the Public Domain. Privacynorms for camera surveillance on public order [*Camera's in het publieke domein. Privacynormen voor cameratoezicht op de openbare orde*]. The Hague, College bescherming persoonsgegevens, November 2004.

stances a breach of privacy is allowed. Although the use of cameras in private places will be discussed briefly, this section focuses on the use of cameras in public places and explores the boundaries of legitimate use and the consequences of crossing these boundaries.

Observation by the police may lead to an interference with the private life of individuals and such activity should, according to Article 8 ECHR and Article 10 of the Dutch Constitution, be based on the law. In Dutch law, a distinction is made between minor interferences with the private life of individuals, which are qualified as non-systematic observations, and more serious interferences with private life, qualified as systematic observations. The legal basis for systematic observation is laid down in Articles 126g and 126o of the Dutch Code of Criminal Procedure. These Articles were added to the Code by the Special Investigative Powers Act [*Wet bijzondere opsporingsbevoegdheden*] of February 2000. For systematic observations, an explicit order from the public prosecutor must be obtained beforehand. According to the case law, less invasive observations can be based on the general authority of the police as laid down in Article 2 of the Police Act [*Politiewet*] and Articles 141 and 142 of the Code of Criminal Procedure.

Apart from several formal conditions, an explicit order from the public prosecutor is necessary for using a camera for systematic observation. An order cannot be obtained subsequently. Evidence that has been collected before the order was given, must be excluded as evidence, according to the District Court of The Hague several months after the Special Investigative Powers Act came into force.²⁹

Whether police observations should have been ordered or whether they can be based on the general police authority is the main question in most case law where the legitimacy of observations (including camera surveillance) has been questioned. In the case law, the phrase ‘more than a small degree of interference’ with privacy plays a key role in answering this question. Although the case law is rather casuistic, it does provide some insight into the legitimacy of camera surveillance. It is interesting that, according to the guidelines of the Department of Public Prosecutions [*Openbaar Ministerie*], the use of technical equipment, such as video surveillance equipment, should be ordered by the public prosecutor, but in most cases the courts find that the absence of such an order does not constitute a breach of Article 8 ECHR and they conclude that Article 2 of the Police Act provides a sufficient legal basis.³⁰

In a 2001 case concerning the observation of premises used for drug trafficking for a period of four months, the Supreme Court explicitly stated that one of the relevant factors for determining the degree of interference is the seriousness of the offence.³¹ In this case, the police had installed a camera that observed the front

²⁹ Rb. 's-Gravenhage 18 June 2002 LJN-nummer AE4449 <<http://www.rechtspraak.nl>> (*Privacy protected by a camera*), PN 2004-143.

³⁰ B.J. Koops, *Strafrecht en ICT* (Den Haag, SDU Uitgevers 2004) p. 111.

³¹ HR 10 April 2001 LJN-nummer AB0970 <<http://www.rechtspraak.nl>> (*Four months' observation of drug premises*), PN 2004-144.

door of a house, to investigate whether the suspect and others were involved in drug trafficking. More serious offences seem to justify a greater interference with privacy. In a decision in 2000, the District Court of The Hague concluded that the level of privacy which a suspect may expect is lower than normal citizens might expect because of the seriousness of the criminal activity he was involved in.³² The court stated that if someone has committed a serious crime and covers up his behaviour, the police cannot suffice themselves with light observation techniques. The frequency of the criminal offences has also been found to be of relevance in deciding whether observation is proportionate.³³ Similarly, if criminal activity causes a rather serious nuisance in a neighbourhood, the use of permanently installed cameras can be justified. In a ruling by the District Court of Rotterdam, it was decided that the permanent use of surveillance cameras in the Rotterdam district of Saftleven was lawful because of the nuisance caused by drug selling and trafficking in that neighbourhood.³⁴ Similarly, it was decided that repeatedly committed sexual offences in a neighbourhood with many children can justify the observation by cameras for a longer period.³⁵ Besides the seriousness of the presumed criminal offences, the seriousness of the criminal activities' effects on citizens is also of relevance.

In many cases concerning observation by cameras, it appears that, apart from the seriousness of the offences, other circumstances also play an important role in determining whether there is 'more than a small degree of interference' with privacy. These circumstances are: the duration of the observation, the intensity, the location, the purpose, and the way in which the observation takes place.

It seems impossible to separate the circumstances mentioned above. Observation with static cameras during four³⁶ or five³⁷ months is considered to be a small degree of interference, due to the seriousness of the committed offences, and to the fact that observation was limited to a public place and was visible to everyone. An observation lasting eight months, without cameras being used, was considered to have 'more than a small degree of interference', because of a social security investigator who regularly peered into the house of someone who was suspected of social security fraud. Observation, with or without using a camera, within the suspect's house, is always a serious invasion of privacy.

³² Rb. 's-Gravenhage 21 November 2000 LJN-nummer AA8414 <<http://www.rechtspraak.nl>> (*Veiled behaviour*), PN 2004-145.

³³ HR 12 February 2002 LJN-nummer AD7804 <<http://www.rechtspraak.nl>> (*Observation of a public road*), PN 2004-146.

³⁴ Rb. Rotterdam 29 August 2000 LJN-nummer AA6924 <<http://www.rechtspraak.nl>> (*Saftlevenkwartier*), PN 2004-147.

³⁵ Rb. Leeuwarden 17 July 2001 LJN-nummer AB2717 <<http://www.rechtspraak.nl>> (*Sexual offences in a neighbourhood with many children*), PN 2004-148.

³⁶ HR 10 April 2001 LJN-nummer AB0970 <<http://www.rechtspraak.nl>> (*Four months' observation of drug premises*), PN 2004-144.

³⁷ HR 12 February 2002 LJN-nummer AD7804 <<http://www.rechtspraak.nl>> (*Observing a public road in front of a house*), PN 2004-146.

In most cases, observing the entrance of a house can be based on the general police authority and can therefore be qualified as non-systematic. The courts find it of relevance that the use is limited to a public place. If the suspect does not live in the observed house or if the observed building is commercial property, a breach of privacy is less likely than would otherwise be the case.³⁸ However, a camera observing the road in front of a private home has also been found to be a minor interference with the privacy of the suspect.³⁹ Cameras used to observe larger areas of a public place can also be based upon the general competences of the police as formulated in Article 2 Police Act 1993, and in Articles 141 and 142 Code of Criminal Procedure. In the case of the Rotterdam district of Saftleven, which has already been mentioned with respect to the relevance of the seriousness of the criminal offences, a permanent system was used that was focused on public areas.⁴⁰ Permanent observation by cameras in a rather large area was not considered to be 'systematic' in this case, because the observation did not focus on a specific person or suspect.⁴¹ If someone who appeared in the picture subsequently became suspected of having committed a criminal offence, these cameras can also be used to observe this person temporarily. In combining the fact that the presence of cameras has been made known by placing a warning sign and the fact that the offences were serious, the Rotterdam District Court concluded that there was no more than a small degree of interference with the private life of the suspect.

A similar decision was delivered by the District Court of Leeuwarden in 2001. In a neighbourhood with many children and where several sexual offences had been committed, the use of several cameras could be based upon the general police competence.⁴²

In a more recent case, the Supreme Court decided that the evidence obtained by permanently installed cameras in the city centre of Rotterdam could be used in a case against a graffiti sprayer, because the cameras did not invade the private life of the suspect. The court said that since the cameras were observing areas in a public place, it was not a situation in which the suspect had a reasonable expectation of privacy.⁴³ With regard to the purpose of the observation, i.e., to maintain order and security in public places, and the way this was done, i.e., by means of more than

³⁸ HR 10 April 2001 LJN-nummer AB0970 <<http://www.rechtspraak.nl>> (*Front-door observation*), PN 2004-144; HR 11 April 2000 LJN-nummer AA5442 <<http://www.rechtspraak.nl>> (*Camera focused on business property*), PN 2004-149.

³⁹ HR 12 February 2002 LJN-nummer AD7804 <<http://www.rechtspraak.nl>> (*Observation of the public road*), PN 2004-146.

⁴⁰ Rb. Rotterdam 29 August 2000 LJN-nummer AA6924 <<http://www.rechtspraak.nl>> (*Saftlevenkwartier*), PN 2004-147.

⁴¹ Art. 126g of the Dutch Code of Criminal Procedure could not be applied, as this Article deals with orders given for the systemic observation of a specific person.

⁴² Rb. Leeuwarden 17 July 2001 LJN-nummer AB2717 <<http://www.rechtspraak.nl>> (*Sexual offences committed in a neighbourhood with many children*), PN 2004-148.

⁴³ HR 20 April 2004 LJN-nummer AL8449 <<http://www.rechtspraak.nl>> (*Permanent cameras in a public place*), PN 2004-150.

one fixed and movable camera in accordance with a legitimate procedure, any interference with the right to privacy of the suspect during the time he and his accessories had been observed was too limited to be a real interference. With this decision, the Supreme Court followed the *Lüdi* decision of the European Court of Human Rights (ECHR), namely, that there are situations that do not constitute a breach of privacy and therefore do not constitute of breach of Article 8 ECHR. The court stated that the fact that the camera surveillance did not have a sufficient legal basis was in itself not sufficient to consider a breach of privacy.

According to The Hague District Court, the use of cameras can sometimes also be advantageous to a person's privacy and therefore no separate order is needed to legitimise its use.⁴⁴ The Hague District Court concluded this in a case where a camera had been used to observe which persons walked on a certain path. Equipment to eavesdrop and record secret communications was installed in a home. These heavy-handed means were only applied when it appeared from recorded pictures that specific persons whose communications were ordered to be recorded in a preliminary hearing would participate in a particular communication. No separate order was given for the use of the camera, but because of the privacy protecting character, the court concluded that interference with the private life was limited, and that Article 2 Police Act 1993 and Article 141 Code of Criminal Procedure provided legitimate grounds for using the camera. The recorded pictures were allowed as evidence in the proceedings.

In quite a large number of situations, the courts conclude that the general investigative powers of the police as laid down in Article 2 Police Act 1993 and Articles 141 and 142 of the Code of Criminal Procedure, can very well serve as a legitimate ground. The consequence of an observation that is not lawfully ordered according to Articles 126g or 126o of the Code of Criminal Procedure, and cannot be based on the general investigative powers of the police, is that the material thereby obtained cannot be admitted as evidence.

In the social security fraud case mentioned above, in which no cameras were used, the Dutch Supreme Court concluded that the general competences of the police were not sufficient.⁴⁵ However, the fact that the interference with the suspect's private life was considered to be sufficiently serious did not work out very positively for the suspect concerned. Relevant was that the observations were not used as evidence to support the case. If the observations had been used as evidence, they should have been excluded on the basis of Article 8 ECHR (private life). There was no reason to exclude other evidence, as there was no indication that the confessions made had resulted from confronting the suspects with the results of the observations. Although the breach of privacy did not result in the exclusion of the evidence,

⁴⁴ Rb. 's-Gravenhage 18 June 2002 LJN-nummer AE4449 <<http://www.rechtspraak.nl>> (*Privacy protected by a camera*), PN 2004-143.

⁴⁵ HR 21 March 2000 LJN-nummer AA5254 <<http://www.rechtspraak.nl>> (*Observation in a social security fraud case*), PN 2004-151.

the court said that the breach of privacy might be a ground for a reduced sentence pursuant to Article 359a of the Code of Criminal Procedure. The court explicitly stated that such a breach of private life was not in conflict with the principle of a fair trial.

6.3.3 Prevention of public disorder within municipal boundaries

Currently, Dutch legislation has no specific provision for observing a complete neighbourhood with cameras for a long period of time. Because it is questionable whether a sufficient legal ground exists for the local government to place cameras for surveillance purposes, the Dutch cabinet has drafted a bill to provide a legal ground for camera surveillance in public places by local governments.⁴⁶ This bill, to be incorporated in the Dutch Municipalities Act [*Gemeentewet*], will introduce a competence for the municipal council to allow the mayor to decide to use camera surveillance in a public place for a certain period when this is necessary for the prevention of public disorder.

The bill contains several criteria for the lawfulness of using cameras for surveillance in public places. These criteria are very similar to the policy document from the Dutch government discussed earlier,⁴⁷ which was based on the report ‘In beeld gebracht’ by the Dutch Data Protection Authority.⁴⁸ The proposed criteria for lawfulness are:

- fixed cameras may only be placed for a certain period of time;
- the presence of the cameras must be obvious to everyone in the specific public place (transparency);
- the cameras may only focus on public places;
- pictures may only be stored for the prevention of disorder, and the maximum retention period is seven days;
- the pictures stored constitute a temporary police register in accordance with the Police Files Act;
- at least one month after the surveillance period, the mayor must send a report on the effectiveness of the cameras.

⁴⁶ Wijziging van de Gemeentewet en de Wet politieregisters in verband met de invoering van regels omtrent het gebruik van camera's ten behoeve van toezicht op openbare plaatsen [*Amendment of the Municipalities Act and the Police Files Act concerning Camera surveillance in public places*]. Kamerstukken II, 2003/04, 29 440, No. 1-5.

⁴⁷ Cameratoezicht, Brief van de Minister van Justitie en van de Minister en Staatssecretaris van Binnenlandse Zaken [*Letter by the Minister of Justice, the Minister and the Parliamentary State Secretary of the Interior on Camera Surveillance*], 24 November 1997. Kamerstukken II, 1997/98, 25 760, No. 1.

⁴⁸ Dutch Data Protection Authority, research report entitled ‘In beeld gebracht’, The Hague, January 1997.

According to a recent study by the Data Protection Authority, in 18 per cent of all municipalities, camera surveillance was used by the police for observations in criminal investigations. These observations were specifically focused on one person or a limited number of people suspected of criminal activities. A larger number, namely over two-thirds of the municipalities, said that camera images were also used for police investigations.⁴⁹ In these cases the cameras were primarily used for surveillance purposes and the images were used if something unlawful had occurred. This leads to the question of under what circumstances are the pictures taken by these cameras admissible as evidence in a criminal procedure.

In the *Saftlevenkwartier* case, cameras were used in accordance with the criteria in the parliamentary memorandum. First, warning signs were placed at the outward boundaries of the observed area. The suspect in this case also declared that he knew that he was being observed by cameras. Second, with reference to Article 8, paragraph 2 ECHR, the District Court argued that the interference by a public authority was in accordance with the law, and was necessary in a democratic society in the interest of public safety and the prevention of disorder or crime. Furthermore, the court observed that Article 2 Police Act 1993, stating that the police are charged with maintaining law and order, provides a sufficient legal ground for this interference.⁵⁰ Third, the district of Saftleven had been suffering from trouble for a long time, and the court agreed with the police that observation with cameras would be a necessary supplement to street surveillance by the police. Fourth, however, no attention was paid to the fairness of the processing of the collected pictures, although the court did mention that the pictures were recorded twenty-four hours a day, and were directly observed by a police officer.

The argument from the Leeuwarden District Court in July 2001⁵¹ was less clear. The court did not answer the question of whether the use of cameras had been notified. It was also unclear whether the notification was of importance according to the Leeuwarden District Court. The court concluded that the use of this investigative power was legitimate, because it could be based on Article 2 Police Act 1993 and Articles 141 and 142 Code of Criminal Procedure. This was the only observation by the court on the legitimate use of the cameras. Later, the court determined that Article 126g Code of Criminal Procedure was not applicable, because there had been no systematic observation.

The Leeuwarden District Court paid more attention to the criteria of subsidiarity and proportionality. As a result of reports of sexual offences, of which some very young girls had been the victims, the police started additional surveillance in the

⁴⁹ Dutch Data Protection Authority, Onderzoeksrapport Cameratoezicht in de openbare ruimte [*Report on Camera Surveillance in Public Places*], November 2003. On the Internet: <http://www.cbpweb.nl/downloads_rapporten/rap_2003_cameratoezicht.pdf>, last visited October 2004.

⁵⁰ Rb. Rotterdam 29 August 2000 LJN-nummer AA6924 <<http://www.rechtspraak.nl>> (*Saftlevenkwartier*), PN 2004-147.

⁵¹ Rb. Leeuwarden 17 July 2001 LJN-nummer AB2717 <<http://www.rechtspraak.nl>> (*Sexual offences committed in a neighbourhood with many children*), PN 2004-148.

neighbourhood where these offences had taken place. However, this additional effort could not prevent a new rape case in the same district. Only after this latest incident did the police start placing cameras focused on the public road. Because of the seriousness of these crimes, and the fact that less far-reaching means were not successful, the Leeuwarden District Court concluded that the criteria of subsidiarity and proportionality had been fulfilled. Furthermore, the public prosecutor had assessed the necessity of using these cameras on a week by week basis.

According to the District Court, the processing of the collected pictures was fair, because the pictures were registered and deleted automatically after a short period of time and pictures were only examined subject to certain guarantees when specific incidents had occurred.

6.3.4 Observation by private parties in public places

As we saw above, public authorities are bound by the law when using cameras for surveillance purposes in a public place. According to the Data Protection Authority, the use of cameras focused on public places is in general only permitted by public authorities, but the involvement of private parties in camera surveillance in public places is to some extent allowed. In a case of co-operation between the police and private security companies,⁵² the Data Protection Authority said that the police were responsible for surveillance activities in that public place. If a private security company monitors the public road, this should be considered as the performance of a police duty. This is only allowed under the supervision and strict responsibility of the police. Private security officers are only allowed to view the recorded pictures together with a police officer.

According to a Data Protection Authority report concerning several brothel keepers in the Amsterdam red-light district, private parties may have a legitimate interest in using cameras that are focused on public places.⁵³ In relation to the lawfulness of camera surveillance by private parties in public places, it is of importance to note in this case that a brothel keeper's cameras filmed a substantial part of the public road. The Data Protection Authority advised the brothel keepers to take measures to guarantee that only those places and persons were filmed which were necessary for ensuring the safety of the prostitutes. Whenever these cameras interfered with the privacy of passers-by and visitors, this interference should be minimised. With the approval of the Data Protection Authority, only limited areas of the public road could be filmed.

⁵² Dutch Data Protection Authority, 25 April 2000, z2000-0380 (*Public-private co-operation*).

⁵³ Dutch Data Protection Authority, 21 May 1997, No. 96.O.418.10 (*Cameras in the Amsterdam red-light district*).

6.4 CAMERA SURVEILLANCE IN PRIVATE PLACES

6.4.1 Introduction

As Frank Hendriks will discuss the case law on video surveillance in the workplace in the following chapter, we will make some general remarks on the different approaches taken to workplace monitoring and other use of camera surveillance in private places. In workplace monitoring, camera surveillance is often used within the legal framework of a contractual relationship. We will also pay attention to examples of camera surveillance in situations where there is no contractual relationship between the user of camera surveillance and the data subject, like visitors to a casino. Camera surveillance is also becoming more widespread in shops and in the home for the protection of property.

6.4.2 The workplace

An employer has to balance different interests before it is allowed to install one or more cameras focused on its employees. As has been discussed earlier, the works council must approve the decision of the employer before the cameras are installed in the workplace. However, the employer is allowed to use cameras without the approval of the works council when the cameras will only be used occasionally, for example, to combat theft or fraud. In Dutch case law, installing hidden cameras is often accepted when the employer has a legitimate interest, like preventing theft.⁵⁴

Apart from the legitimate interest of the employer, other circumstances of the case are of importance for balancing the interests. These circumstances are, for example, the extent of the suspicion against a certain employee, or the certainty that somewhere within the company violations have taken place. Other circumstances are the period of time and the points in time when the cameras are recording, the part of the workplace that is being monitored, and the question of whether the use of cameras is proportionate in order to catch the offender.

An early judgment on the use of cameras in an employer-employee relationship is known as the *KOMA* case.⁵⁵ The management of the KOMA Company decided to install cameras in their business premises. The cameras were rolling twenty-four hours a day, and were focused on nearly every part of the business premises. The

⁵⁴ Hof 's-Hertogenbosch 6 January 2003 LJN-nummer AF3787 <<http://www.rechtspraak.nl>> (*Evidence of the employer*), PN 2004-152, CRvB 14 October 1999 LJN-nummer AA4696 <<http://www.rechtspraak.nl>> (*Stealing police officer*), PN 2004-153, HR 27 April 2001 LJN-nummer AB1347 <<http://www.rechtspraak.nl>> (*Accidentally caught shop assistant*), PN 2004-154, Rb. Arnhem 18 January 2001 LJN-nummer AB1825 <<http://www.rechtspraak.nl>> (*Stealing fire fighter*), PN 2004-155.

⁵⁵ Pres. Rb. Roermond 12 September 1985 KG 1985/299 (*KOMA I*), PN 2003-66; Hof 's-Hertogenbosch 2 July 1987 NJ 1987/451 (*KOMA II*), PN 2003-67. See also the chapter in this book by Frank Hendriks: Privacy and Data Protection in the Workplace: the Netherlands.

pictures were not recorded, but directly monitored at the deputy director's office. To legitimise the use of the cameras, the KOMA management stated that the pictures would be used for the supervision of employees, for support concerning technical issues, and for quality control when producing valuable finished products.

The employees felt that their right to privacy had been affected and they instigated legal proceedings against the KOMA management. The employees were assisted by the trade union FNV.

The President of the Roermond District Court considered that supervising employees by an employer in a working relationship is not an interference with the right to privacy, when a special officer exercises the surveillance personally. The court stated that replacing such personal surveillance fully or partly by cameras could be considered as crossing the border of interfering with the employees' right to privacy. However, this does not mean that the mere fact that employees consider that the use of cameras interferes with their right to privacy is normative. According to this judgment, the employer is allowed to install cameras when he has a legitimate interest in doing so. The court of appeal in the *KOMA* case mentioned several substantial interests, for example, to protect installations against theft or destruction by third parties, or when a complicated technical production process requires continuous, visualised, and simultaneous supervision at different places.

The judgments by the President of the Roermond District Court and by the court of appeal in the *KOMA* case emanate from the 1980s. Later, several other judgments were delivered on the use of cameras in the workplace. Most cases concern the use of cameras against theft, some of which will be mentioned below.

When a particular employee is suspected of an offence, only this employee should be monitored. By using a camera, this camera should be focused on monitoring this specific employee, while respecting other employees' right to privacy as far as possible.⁵⁶ To realise this, a camera can be focused on the cash desk or safe deposit box from which money is taken, or a camera may be activated only at specific moments.⁵⁷ When these conditions are met, and a hidden camera is installed to collect evidence against a certain employee, and less far-reaching means would not have delivered the same result, the Dutch Supreme Court will accept such an interference with the privacy of the suspected employee's colleagues as being very limited.

When evidence is accidentally collected against another employee who commits an offence, the collected evidence may be used against this employee. This is what the Dutch Supreme Court concluded in a case in which a camera was used to verify a strong suspicion against a supervisor in a shop.⁵⁸ To catch this supervisor,

⁵⁶ HR 27 April 2001 LJN-nummer AB1347 <<http://www.rechtspraak.nl>> (*Accidentally caught shop assistant*), PN 2004-154.

⁵⁷ CRvB 14 October 1999 LJN-nummer AA4696 <<http://www.rechtspraak.nl>> (*Stealing police officer*), PN 2004-153, Rb. Arnhem 18 January 2001 LJN-nummer AB1825 <<http://www.rechtspraak.nl>> (*Stealing fire fighter*), PN 2004-155.

⁵⁸ HR 27 April 2001 LJN-nummer AB1347 <<http://www.rechtspraak.nl>> (*Accidentally caught shop assistant*), PN 2004-154.

the employer focused a camera on the cash desk. Apart from the supervisor, another employee was caught accidentally. The privacy of the latter was only invaded to a lesser extent. The Supreme Court accepted the instant dismissal, based on the camera evidence.

Another distinctive issue in dismissal cases is the integrity of public servants. Case law exists with regard to a stealing police officer⁵⁹ and a stealing fire fighter.⁶⁰

At a local police station, money disappeared from a safe deposit box, where seized money and other valuable property were stored. At a fire department, money disappeared from the cash desk in the canteen, and drinks were stolen from the refrigerator in the same canteen. The chief constable of the police department had a camera installed, focusing on the safe deposit box. The chief fire officer had a camera installed, which only recorded pictures when someone entered the canteen. In both cases, the judges concluded that enough evidence had been lawfully collected. The police officer and the fire fighter had been legally and validly dismissed.

The Central Appeals Tribunal [*Centrale Raad van Beroep*, a court of appeals for the public service and for social security matters) and the Utrecht District Court concluded that the chief constable and the chief fire officer had a sufficient interest in installing their cameras. The courts also concluded that the chief constable and the chief fire officer had acted sufficiently carefully to limit the interference with the right to privacy of the other police officers and fire fighters. Furthermore, both courts concluded that maintaining the integrity of the police department as well as the fire department was an additional legitimate reason for the use of cameras in these cases. Maintaining the integrity of some government bodies is so important that interfering with the right to private life of public servants by using a hidden camera will normally not be considered as anything ‘more than a small degree of interference’.

In the case against the stealing fire fighter, the Arnhem District Court concluded, furthermore, that employees who are present after working hours, or who are trespassing, should expect more interference with their privacy. We think that this conclusion cannot be valid in every case, however. Specific circumstances, like the corporate culture, can result in the presence of an employee after working hours. The presence of an employee at another place can also be based on legitimate reasons, like chatting with a friendly colleague. It should therefore not be taken for granted that interference with the privacy of those employees present after working hours or at other working places is not ‘more than a small degree of interference’ when hidden cameras have been installed.

⁵⁹ CRvB 14 October 1999 LJN-nummer AA4696 <<http://www.rechtspraak.nl>> (*Stealing police officer*), PN 2004-153.

⁶⁰ Rb. Arnhem 18 January 2001 LJN-nummer AB1825 <<http://www.rechtspraak.nl>> (*Stealing fire fighter*), PN 2004-155.

In criminal proceedings against a former employee, who had been dismissed on suspicion of theft, the Den Bosch District Court⁶¹ concluded that the evidence against the employee was lawfully collected with a hidden camera. The employer had noticed that, since the employee had commenced employment, differences in the inventory had increased significantly. A specific observation by a colleague of this employee confirmed the suspicion that the employee was responsible for the differences in the inventory. Therefore, the employer decided to install a camera, in the workplace of the suspected employee. The court concluded that, despite the interference with the privacy of the employee due to the prolonged use of the camera, the employer had a legitimate interest installing this camera, based on the specific suspicion. The employer was allowed to have the camera installed, to verify the suspicion and to protect its own property.⁶²

6.4.3 Camera surveillance in non-contractual relationships

To prevent controversy concerning its guests' privacy, Holland Casino presented its plans to install cameras in the general area of the toilets at its casinos to the Dutch Data Protection Authority.⁶³ The Data Protection Authority recognised the obligation for Holland Casino to protect security, order, and peace in their establishments, and to prevent and solve unlawful or objectionable incidents. However, the Data Protection Authority considered that these obligations were not sufficiently substantial to interfere with the right to privacy of those guests who visited the toilets. Rest rooms are places where interference with the right to privacy is unusual and therefore not expected. The fact that objectionable practices may take place there is insufficient to breach visitors' privacy. The interest of Holland Casino was not proportionate, considering the interference with the right to privacy caused by the recording camera. Nevertheless, according to the Data Protection Authority, it would be lawful to use a camera occasionally, if there was a specific suspicion that objectionable practices were taking place. The integral and permanent recording of all toilet visitors was disproportionate, considering its purpose (preventing objectionable incidents) and therefore constituted an unjustified interference with the right to privacy.

If a shop owner places cameras in and around his shop, he probably does this to protect his property, his customers, and his personnel more effectively. The Personal Data Protection Act allows a shop owner to make use of cameras subject to certain conditions. He has to inform his customers and personnel clearly that he is using camera surveillance in his store, for example, putting up a sign to that effect.

⁶¹ Hof 's-Hertogenbosch 6 January 2003 LJN-nummer AF3787 <<http://www.rechtspraak.nl>> (*Evidence collected by the employer with a hidden camera*), PN 2004-152.

⁶² For a discussion on the penalisation of hidden cameras in Arts. 139f and 441b of the Criminal Code, see section 6.2.3.

⁶³ Data Protection Authority, 7 February 2000, z1999-0426 (*Holland Casino*).

He is punishable if he does not. Camera surveillance in shops is allowed if interference with the privacy of customers is reduced to a minimum. Therefore, placing a camera in a fitting room is not allowed. Camera surveillance in a store can also be applied as an employee-monitoring system. In that case, additional provisions are applicable related to the protection of workplace privacy. There are limitations as to what a shop owner can do with the recorded images, as is illustrated by a recent decision of the District Court of Amsterdam. In this case, the court decided that a shop owner could not place a photo of a suspected thief in his shop window as it infringed the rights of an individual concerning his or her own portrait.⁶⁴

Cameras can also be placed in and around the home, for example, to protect the owner's property. A housing association can decide to use camera surveillance to protect its houses and apartments, but also an individual occupant may decide to protect his home with camera surveillance outside his property. The Personal Data Protection Act does not prohibit such use, but there are limitations. Monitoring the whole street with a camera is not allowed and this is reserved for the municipality and the police (see also 6.3.4). The cameras should be aimed in such a way that they film public areas as little as possible and they must not be directed towards filming inside someone else's house. Besides, it must be made clear that camera surveillance is used, for example, by means of a sign or a sticker. It should also be clear who is responsible for the camera surveillance. A citizen must be able to know where to request information or to file a complaint.

The Personal Data Protection Act is not applicable to pictures taken for personal use. Therefore, it does not provide a remedy for situations in which someone is stalked by a person with a camera or a webcam. Although the act is not applicable in such a case, the person using a camera in this way is interfering with the privacy of somebody else. If confronting and talking to such a person does not have any effect, the victim may go to the police and report the stalking, which is a criminal offence laid down in Article 285 of the Dutch Penal Code. Another possibility is to sue the stalker and request an injunction to the effect that the stalker is not allowed to contact the victim or that the stalker is not allowed in a certain street or area.⁶⁵

6.5 CONCLUSION

In Dutch case law, the lawfulness of camera surveillance has been tested in several contexts, especially in the area of criminal law and in employment disputes. This is not surprising, as a reason to question the legality of an invasion of privacy will be

⁶⁴ Voorzieningenrechter Rb. Amsterdam LJN-nummer AQ7877 <<http://www.rechtspraak.nl>>, PN 2004-156.

⁶⁵ B.O. Dittrich, 'Stalking, een misdrijf dat in Nederland nog niet strafbaar is', in *Stalking is levensbedreigend, Zwartboek*, deel 1 (Westerbork, Stichting Anti Stalking, November 1997) pp. 23-25.

present if the information collected through that breach of privacy potentially harms certain interests that are of great importance to the person concerned, e.g., this person's freedom or income.

To some extent, the concept of reasonable expectations of privacy is used in the Netherlands. In criminal case law, the seriousness of the criminal offence, the frequency, and the effects of the offence for other citizens are factors that seem to lower the level of privacy which suspects of criminal activity may expect. The reasonable expectations of privacy concept is also used to determine in what situations observation technology, such as camera surveillance, does not invade the privacy of individuals at all, according to a recent decision of the Dutch Supreme Court.⁶⁶

In the workplace someone suspected of an offence may also lawfully be subjected to camera surveillance to a greater extent than other employees. The concept of reasonable expectations of privacy is used to some extent, but it is primarily used to legitimise certain privacy-invasive measures.

In non-contractual private relationships, interference with the right to privacy is not to be expected in the toilet of a casino or in a fitting room of a shop, according to the Dutch Data Protection Authority. Shop owners who use camera surveillance must always inform their customers and their personnel thereof. Camera surveillance to protect a house is allowed as long as the camera does not focus on the street or film inside another house. It should also be made clear to visitors that camera surveillance is being used.

In general, it depends on the context (criminal, public places, workplace, or private places) whether we can expect privacy or camera surveillance. In most situations, the user of camera surveillance is obliged to inform the public. Because, in our view, camera surveillance is in fact an interference with privacy, we think that the main question should be whether this interference is legitimate, balancing different interests. It seems to us that this question can be answered more easily and fairly by balancing the different interests, rather than testing the use of camera surveillance against the vague concept of a 'reasonable expectation of privacy'.

⁶⁶ HR 20 April 2004 LJN-nummer AL8449 <<http://www.rechtspraak.nl>> (*Permanent cameras in a public place*), PN 2004-150.